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Supreme Court, U.S.
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No. 03-1077

In The Supreme Court of the United States

COREY THOMAS,

Petitioner,

v.

WAL-MART STORES, INC.,

Respondent.

ANTHONY A. MONTAGUE,

Petitioner,

v.

ASPLUNDH TREE EXPERT CO.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENT ASPLUNDH TREE EXPERT CO. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eleventh Circuit correctly applied well-established employment discrimination case law in holding that Petitioner Anthony A. Montague failed to create a genuine issue of material fact as to Respondent Asplundh Tree Expert Company's decision to terminate his employment for insubordination?

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT[1]

The Petition for Writ of Certiorari seeks review of two unrelated opinions from the Eleventh Circuit Court of Appeals. Corey Thomas is the Petitioner in the first case and Wal-Mart Stores, Inc. is the Respondent. In the second case, Anthony A. Montague is the Petitioner and the Respondent is Asplundh Tree Expert Company ("Asplundh"). Asplundh was the corporate defendant in the District Court and the Appellee in the Eleventh Circuit in the case and appeal brought by Montague.

Asplundh Tree Expert Company has no parent company and no publicly held company owns ten percent or more of its stock.

[1] Respondent Asplundh Tree Expert Company submits this Opposition in response to the Petition for a Writ of Certiorari as it relates to Anthony Montague.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTIONAL BASIS	1
STATUTES INVOLVED IN THE CASE	2
INTRODUCTION	4
COUNTERSTATEMENT OF THE CASE	5
A. Background on Asplundh	5
B. Company Policies	6
C. Montague's Employment	6
D. Montague's Opposition Activities	7
E. Opening for General Forman	7
F. Events Leading to the Termination of Montague's Employment	8
1. Rumors of Sexual Harassment	8
2. Montague's Insubordination	10
3. The Decision to Terminate Montague's Employment	12
G. Montague's Request for Rehire	13
REASONS FOR DENYING WRIT	14
I. MONTAGUE PRESENTS NO BASIS FOR THIS COURT'S REVIEW	14

TABLE OF CONTENTS – Continued

Page

II. MONTAGUE AND THOMAS DO NOT INVOLVE IDENTICAL OR CLOSELY RELATED QUESTIONS 15

III. THE ELEVENTH CIRCUIT PROPERLY APPLIED THE SUMMARY JUDGMENT STANDARD 16

IV. *DESERT PALACE* DOES NOT EVISCERATE *MCDONNELL DOUGLAS* 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES:

Corey Thomas v. Wal-Mart Stores, Inc. (unpublished) (11th Cir., October 30, 2003) 15

Desert Palace, Inc. v. Costa, 123 S. Ct. 2148 (2003) 4, 5, 18, 19, 20

Lehman v. Lycoming County Children's Serv., 458 U.S. 502 (1982) 14

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 16, 18, 19, 20

Monrosa v. Carbon Black, Inc., 359 U.S. 180 (1959) 14

Raytheon Company v. Hernandez, 124 S. Ct. 513 (2003) 19, 20

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) 16

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) 17

STATUTES:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1981 ..... 2, 4

42 U.S.C. § 2000e-2(a) 2

42 U.S.C. § 2000e-3(a) 3

OPINIONS BELOW

The Eleventh Circuit Court of Appeals' October 1, 2003, opinion in *Montague v. Asplundh Tree Expert Co.*, No. 03-12274, is unpublished (Pet. App. 36-43). On December 11, 2003, the Eleventh Circuit Court of Appeals denied petitioner Anthony A. Montague's Petition for Rehearing and for Rehearing En Banc (Pet. App. 64-65).

The District Court of the Northern District of Alabama, Northeastern Division, entered summary judgment in favor of Respondent Asplundh Tree Expert Company in an unpublished opinion on March 27, 2003 (Pet. App. 44-63).

JURISDICTIONAL BASIS

The Petition for Writ of Certiorari seeks review of two unrelated opinions from the Eleventh Circuit Court of Appeals. The judgment of the Eleventh Circuit Court of Appeals affirming summary judgment for Respondent Asplundh Tree Expert Company in the appeal by Petitioner Anthony Montague was entered on October 1, 2003. The Eleventh Circuit denied Montague's Petition for Rehearing and Petition for Rehearing En Banc on December 11, 2003. Montague filed the Petition for a Writ of Certiorari on January 27, 2004, seeking to invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

42 U.S.C. § 1981:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 2000e-2(a) Employer Practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of

employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-(3)(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

INTRODUCTION

Petitioner Anthony Montague ("Montague") worked for Asplundh Tree Expert Co. ("Asplundh") as a Coordinator until his employment was terminated for insubordination after he engaged in a physical altercation with his supervisor. On February 28, 2002, Montague filed a complaint in the United States District Court for the Northern District of Alabama under Title VII of the Civil Rights Act of 1964, as amended, and 42 U.S.C. § 1981 alleging that Asplundh terminated his employment based on his race and his complaints of alleged discrimination.

In the litigation, Montague did not uncover any evidence to support his theory that Asplundh fired him based on his race or in retaliation for his complaints of alleged discrimination. To the contrary, the evidence showed that Asplundh fired Montague for insubordination when he engaged in an altercation with his supervisor. The evidence further showed that Asplundh fired a white employee who engaged in the same conduct.

Under these facts, the District Court properly dismissed Montague's claims, and the Eleventh Circuit properly affirmed the dismissal. Montague argues that the Eleventh Circuit erred because it did not follow this Court's decisions establishing the applicable summary judgment standard. Contrary to Montague's assertion, the Eleventh Circuit followed this Court's well-established precedent setting forth the applicable summary judgment standard. Montague also argues that this Court's decision in *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003), eviscerated over 30 years of employment discrimination law and that the Eleventh Circuit refused to use this newly-created format for analyzing his claims. However,

this Court has made clear in at least one case after *Desert Palace* that the long-followed and well-established burden-shifting analysis of employment discrimination claims remains the law. As such, the Eleventh Circuit properly applied the correct standard and this Court should deny Petitioner Montague's request for review of the lower courts' rulings.

COUNTERSTATEMENT OF THE CASE[2]

A. Background on Asplundh

Asplundh provides a variety of services to the electrical utility industry, primarily clearing trees, brush, and undergrowth from electrical power lines (Doc. 39) (Miller Aff. ¶ 1).[3] Asplundh's services are provided through crews consisting of two to six workers, and supervised by a Crew Foreman (*Id.*). The Crew Foreman reports to a General Foreman, and the General Foreman reports to a Supervisor (Doc. 39) (Pl. Depo. p. 40; Rice Depo. p. 14). Asplundh sometimes employs an intermediate-level supervisor, called a Coordinator, ranked between a General Foreman and a Crew Foreman (Doc. 39) (Miller Aff. ¶ 1). Coordinators supervise several crews, help with payroll and invoices, order materials, and complete time sheets (Doc. 39)

[2] The Statement of Facts set forth in Montague's Petition does not contain the relevant facts considered by the lower courts. Asplundh also objects to the liberty Montague has taken with the facts and the inferences he has included in the facts. In response, Asplundh provides this Counterstatement.

[3] The citations contained in this Counterstatement of the Case are to the record submitted to the Eleventh Circuit.

(Pl. Depo. pp. 44-45). Currently in Asplundh's Huntsville division, Randy Parham (WM) is the Supervisor; Troy Rice (WM) is the General Foreman; and Marty Rowell (WM) and Al Gilbert (BM) are the Coordinators (Doc. 39) (Miller Aff. ¶ 1).

B. Company Policies

Asplundh maintains an equal employment opportunity policy, as well as a discipline and discharge policy (Doc. 39) (Pl. Depo. p. 29; Exh. 3 to Pl. Depo.). Insubordination is specifically identified in both Asplundh's disciplinary policy and regional policy manual as a dischargeable offense (Doc. 39) (Pl. Depo. p. 29; Exh. 3 to Pl. Depo.; Miller Aff. ¶ 4; Exh. A to Miller Aff.).

C. Montague's Employment

In May of 1991, Montague was hired to work as a crew member (Doc. 39) (Pl. Depo. pp. 27, 31; Exh. 2 to Pl. Depo.). Montague received several promotions during his employment and in 1997, he was promoted to a newly-created Coordinator job (Doc. 39) (Pl. Depo. pp. 35, 38, 45, 70). Two years after Montague's promotion, Asplundh lost business with one of its customers, Huntsville Utilities, and as a result, Montague was moved back to a Crew Foreman job, a demotion that Montague does not allege was motivated by his race (Doc. 39) (Pl. Depo. pp. 47-48; Rice Aff. ¶ 1).

After Asplundh regained some of its lost business, Montague was again promoted to the job of Coordinator, in part on the recommendation by General Foreman Troy Rice (Doc. 39) (Pl. Depo. p. 50; Rice Depo. pp. 21-22; Rice Aff. ¶ 2). As Coordinator, Montague worked with another

Asplundh Coordinator, Marty Rowell (WM), as well as Huntsville Utilities' employees Jeff Jordan (WM), Melvin Whitman (BM), and Charlie Davis (BM), who were supervisory employees for Huntsville Utilities (Doc. 39) (Pl. Depo. pp. 53-54). Generally, Huntsville Utilities assigned work to Asplundh, and the Asplundh Coordinators would ensure that the jobs were performed correctly (Doc. 39) (Pl. Depo. p. 55).

D. Montague's Opposition Activities

In 1997, Montague complained about his General Foreman's treatment of black employees (Doc. 39) (Pl. Depo. pp. 67-68). After Montague's complaint, the General Foreman's employment was terminated (*Id.*). Further, Montague claims that throughout his employment with Asplundh he often voiced opposition to racially-offensive behavior and to what he perceived as harassment and discrimination in the workplace (Doc. 39) (Pl. Depo. pp. 37, 60-61, 74-75).

E. Opening For General Foreman

Asplundh had an opening for a General Foreman in Atlanta, Georgia, in April of 2001 (Doc. 39) (Miller Aff. at ¶ 2). All Asplundh employees who were eligible to be a General Foreman and were willing to relocate were sent personal history questionnaires (Doc. 39) (Miller Depo. at 48-49). Because Montague's June 2000 Foreman Evaluation Worksheet indicated that he was ready for a promotion and that he was willing to relocate, Montague was sent a personal history questionnaire (Doc. 39) (Miller Depo. at 48-50 & Exh. 4). Then, on or about Thursday, April 5, 2001, Rice talked with Montague about the

General Foreman job in Atlanta[4] (Doc. 39) (Pl. Depo. at 199). Montague said that he was not interested in moving to Atlanta, and Rice encouraged him to at least consider interviewing for the job (Doc. 39) (Pl. Depo. at 197-200). However, Montague was not interested and did not agree to interview[5] (Doc. 39) (Pl. Depo. at 199-200).

F. Events Leading To The Termination Of Montague's Employment

1. Rumors of Sexual Harassment

On Friday, April 6, 2001, Montague confronted fellow Asplundh Coordinator Marty Rowell about a rumor he had heard to the effect that Rowell and Rice, as well as Huntsville Utilities Supervisor Jeff Jordan, were trying to persuade Amanda Brown, an Asplundh Crew Foreman, to accuse Melvin Whitman (Coordinator for Huntsville Utilities) of sexual harassment (Doc. 39) (Pl. Depo. pp. 104-105; Rowell Depo. pp. 12-13). Rowell denied that there was any truth to this rumor (Doc. 39) (Pl. Depo. p. 105; Rowell Depo. pp. 12-13).

The following Monday morning (April 9, 2001) Rowell related Montague's accusation to Asplundh manager Rice and Huntsville Utilities manager Jordan (Doc. 39) (Rowell Depo. pp. 14-15; Rice Depo. pp. 27-28). Jordan called a meeting later that same morning at Huntsville Utilities to

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[4] Rowell was also offered an interview, but he refused because he did not want to relocate (Doc. 39) (Rowell Depo. at 32).

[5] While Montague claims that he was told the job was his if he wanted it, he was never actually offered the job. (Doc. 39) (Pl. Depo. at 197-201).

discuss the situation (Doc. 39) (Rowell Depo. p. 15; Rice Depo. pp. 28-29). Jordan and Whitman attended the meeting for Huntsville Utilities, and Rice, Rowell, and Montague attended the meeting for Asplundh (Doc. 39) (Pl. Depo. p. 107; Rice Depo. p. 30; Rowell Depo. p. 15).

When the meeting started, Jordan and Rice explained that statements were being made that they, along with Marty Rowell, were trying to persuade Amanda Brown to accuse Melvin Whitman of sexual harassment (Doc. 39) (Pl. Depo. pp. 109-110; Rice Depo. p. 36). Jordan and Rice denied that they or Rowell had ever taken such actions (Doc. 39) (*Id.*). Whitman responded by saying that he did not believe Jordan and Rice, in part because Whitman believed that Rowell and his crew were taking notes regarding what transpired at the work sites in an effort to gather evidence against Whitman (Doc. 39) (Pl. Depo. pp. 110-112; Rice Depo. p. 36). Montague then voiced his opinion, stating:

> If you're going to tell your crew to do this and do this, that's going to make Melvin think that you're being sneaky and underhanded behind his back. And I said, Melvin, if you go to the crew that's going to make Marty think that you're being sneaky and underhanded. I said, y'all just need to come together like men and just talk and you wouldn't have this problem . . .

(Doc. 39) (Pl. Depo. p. 113). Jordan then afforded each person the opportunity to discuss any other issues, and when each person declined to do so, Jordan adjourned the meeting (Doc. 39) (Pl. Depo. p. 115).

2. Montague's Insubordination

After the meeting, Rice asked to meet with Rowell and Montague in the parking lot at Huntsville Utilities because he was upset that they were "not together as a team" and that Montague "had turned" on Rowell[6] (Doc. 39) (Pl. Depo. pp. 118-119; Rowell Depo. p. 20; Rice Depo. p. 40). Rice told Montague that he worked for Asplundh and that he needed to act like an Asplundh employee (Doc. 39) (Pl. Depo. p. 119; Rice Depo. pp. 40, 65; Exh. 1 to Rice Depo.). Montague interrupted him, stating that he had not done anything wrong at the meeting (Doc. 39) (Pl. Depo. p. 119; Rice Depo. pp. 40, 65; Exh. 1 to Rice Depo.). Additionally, Montague stated:

> you know, another thing, you ain't – you can't just talk to me any kind of way because I am thirty-one years old and I don't talk to my kids like that and you're not going to talk to me like that. And I said, you or anybody else in this company ain't going to dictate what I say or cannot say . . .

(Doc. 39) (Pl. Depo. p. 120). At that point, because Montague appeared to be too upset to work, Rice suspended

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[6] Montague cited to Melvin Whitman's Declaration for evidence that Rice's objection to Montague's conduct was not reasonable. However, Whitman was not an Asplundh employee and is not competent to testify or opine on how Asplundh should enforce its work rules or whether Montague's conduct met Asplundh's expectations. Further, Mr. Whitman was not a decision-maker and was not involved in the decision to discharge Montague. Asplundh filed a Motion to Strike the Declaration of Melvin Whitman, which the District Court ruled as moot when granting Asplundh's Motion for Summary Judgment.

Montague for the remainder of the day (Doc. 39) (Pl. Depo. p. 120; Rice Depo. pp. 42, 65; Exh. 1 to Rice Depo.).

Montague claims that as he entered his truck to leave, Rice shouted to Rowell that he had done all he could for Montague (Doc. 39) (Pl. Depo. pp. 122-123; Rice Depo. pp. 42-43, 65; Exh. 1 to Rice Depo.; Rowell Depo. p. 21). In response, Montague exited the truck and resumed his argument with Rice, telling Rice "you ain't done nothing for me" (Doc. 39) (Pl. Depo. p. 122). Rice reminded Montague that he was suspended and told Montague to give him the keys to Montague's Company truck (Doc. 39) (Pl. Depo. pp. 122-123; Rice Depo. pp. 42-43, 65; Exh. 1 to Rice Depo.; Rowell Depo. pp. 21-22). Montague took his Company truck key off his key ring and "pitched" it to Rice, hitting him in the chest (Doc. 39) (*Id.*). Then, Rice told Montague that he needed to "quiet down," and Montague responded with a threat that he would "get" Rice and the Company (Doc. 39) (Pl. Depo. pp. 123-124; Rice Depo. pp. 65, 67-68; Exh. 1 to Rice Depo.; Rowell Depo. p. 22). Montague then demanded that Rice drive him home because he no longer had transportation (Doc. 39) (Pl. Depo. p. 124).

During the trip to Montague's residence, Rice and Montague "yelled and screamed all the way to the house" (Doc. 39) (Pl. Depo. pp. 124-125). Montague told Rice "you can't keep yelling at me, you need to stop, I'm the supervisor, I'm a man" (Doc. 39) (Pl. Depo. p. 124). Along the way, Montague realized that he had left his house key in the Company truck, so the two returned to Huntsville Utilities to retrieve Montague's house key (Doc. 39) (Pl. Depo. p. 133). At that point, Rice allowed Montague to use the Company truck to drive home and told Montague that they would talk the following day (Doc. 39) (Pl. Depo. p. 129; Rice Depo. p. 52).

3. The Decision To Terminate Montague's Employment

After Rice took Montague to the truck, he reported these events to his Supervisor, Randy Parham (Doc. 39) (Rice Depo. pp. 53-54). Parham told Rice to telephone Kerry Miller, Asplundh's Compliance and Equipment Supervisor, who was responsible for Human Resources in Region 52 (Doc. 39) (Miller Depo. pp. 7, 11, 60; Rice Depo. p. 54). Rice called Miller and explained the incident[7] (Doc. 39) (Rice Depo. pp. 55, 65, 70; Exh. 1 to Rice Depo.; Miller Depo. p. 45). That same day, Miller met with Parham to discuss the April 9, 2001 meeting at Huntsville Utilities, and the events in the parking lot after the meeting (Doc. 39) (Miller Depo. p. 46). Miller also talked with Asplundh's General Counsel about the situation (Doc. 39) (Miller Depo. p. 54).

Based on the information he learned, Miller determined that Montague's statements during the meeting at Huntsville Utilities and his later behavior toward Rice in the parking lot constituted insubordination (Doc. 39) (Miller Depo. pp. 39-43). Asplundh's employee handbook provides that insubordination is a terminable offense (Doc. 39) (Miller Depo. p. 50). After making the decision to terminate Montague's employment,[8] Miller called Rice and instructed him to terminate Montague's employment,

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[7] At some unspecified point in time, Rice faxed Miller statements from himself, Rowell and Brown, detailing the incident (Doc. 39) (Miller Depo. pp. 30-33, 45; Exhs. 1-3 to Miller Depo.).

[8] Miller had discharged other employees (Doc. 39) (Miller Depo. pp. 7, 11, 60; Rice Depo. p. 54).

effective April 12, 2001[9] (Doc. 39) (Miller Depo. pp. 52-53; Rice Depo. p. 56; Pl. Depo. pp. 136-138; Exh. 6 to Pl. Depo).

Montague knows of no white employees who were disciplined for insubordination and were not fired (Doc. 39) (Pl. Depo. p. 139). In fact, any Asplundh Coordinator or Asplundh employee who has been insubordinate to a General Foreman has been discharged (Doc. 39) (Miller Aff. ¶ 3; Rice Aff. at ¶ 7). David Bridges, white Crew Foreman, was discharged for insubordination in January 2001 because he cursed at Rice, threatened Rice, and threw keys at Rice (Doc. 39) (Rice Aff. ¶ 8; Exh. B to Rice Aff.).

G. Montague's Request For Rehire

On May 3, 2001, Montague submitted a letter to Asplundh's EEO Officer requesting that he be rehired (Doc. 39) (Pl. Depo. p. 142; Exh. 7 to Pl. Depo). However, Asplundh denied Montague's request for rehire on May 22, 2001, because employees terminated for insubordination are not eligible for rehire (Doc. 39) (Pl. Depo. pp. 142, 156-157; Exhs. 7, 9, and 10 to Pl. Depo.).

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[9] Montague has also pointed out that in response to a discovery request, Asplundh indicated that Troy Rice, Kerry Miller, and Randy Parham made the decision to terminate Montague's employment. This response is not in conflict with other testimony because the evidence is clear that Rice talked with Miller after the incident and that Miller talked with Parham after the incident (Doc. 39) (Miller Depo. at 45-46; Rice Depo. at 55, 65, 70 and Exh. 1). Then, because Miller was responsible for Human Resources in Region 52, the ultimate decision to terminate Montague's employment rested with him (Doc. 39) (Miller Depo. at 11, 39-40).

REASONS FOR DENYING WRIT

I. Montague Presents No Basis for This Court's Review

This Court's rules identify examples of the limited cases this Court considers for review and mandate that a "petition for writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Further, the rules provide that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Despite the clarity of this Court's rules, Montague never acknowledges or addresses the considerations governing review on certiorari. Montague simply restates his unsuccessful arguments to the Eleventh Circuit and seeks this Court's review of a case that represents the application of well-settled employment discrimination law and presents no issues of general importance. The District Court's entry of summary judgment and the Eleventh Circuit's affirmance were proper application of well-settled law and mandate that the Petition be denied.

In addition to this Court's rules governing certiorari, this Court has explained that certiorari is granted only where the case raises "questions of importance not heretofore considered by this Court and over which the circuits are divided." *Lehman v. Lycoming County Children's Serv.*, 458 U.S. 502, 507 (1982). Montague's case does not raise such a question. Nor does Montague's case present a question of public importance "in the context of meaningful litigation." *Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959). Montague's failure to even address this Court's considerations for review dictates that the Petition be denied.

II. Montague and Thomas Do Not Involve Identical or Closely Related Questions

Montague seeks review of his case, along with the unrelated case *Corey Thomas v. Wal-Mart Stores, Inc.*, (unpublished) (11th Cir., October 30, 2003). Pursuant to Supreme Court Rule 12, a single petition for a writ of certiorari covering all the judgments suffices when the two cases "involve identical or closely related questions." Sup. Ct. R. 12. However, the two cases before the Court in this petition do not involve identical or even closely related questions. In addition to the diverse factual backgrounds present in both cases, the two Eleventh Circuit decisions involved different stages of the burden-shifting analysis present in employment discrimination cases. For example, in *Thomas*, the Eleventh Circuit held that the plaintiff Thomas failed to establish a *prima facie* case of discrimination. The *Thomas* decision hinges upon the plaintiff's failure to meet this first step in the burden-shifting analysis. In contrast, the Eleventh Circuit in *Montague* found that the plaintiff Montague had established a *prima facie* case of discrimination and retaliation and focused its analysis on Montague's failure to demonstrate pretext. The differences between the two cases render the two impractical for simultaneous review by this Court. Because the *Montague* and *Thomas* cases do not involve identical or closely related questions, the two cases were improperly joined in the petition before this Court for review. As such, the petition fails to comply with this Court's rules for granting certiorari and for bringing a single petition and this Court should deny the writ.

III. The Eleventh Circuit Properly Applied the Summary Judgment Standard

Although it does not constitute a proper question for this Court's review, Montague attempts to create an issue for review by mischaracterizing the Eleventh Circuit's ruling on the question of pretext. In Montague's Writ, he asserts that the Eleventh Circuit departed from the jurisprudence of this Court and other circuits in its finding that Montague did not show pretext in Asplundh's decision to terminate his employment for insubordination. However, the Eleventh Circuit did no such thing. In contrast to Montague's mischaracterization, the Eleventh Circuit properly followed over 30 years of precedent by requiring Montague to present evidence of pretext in Asplundh's legitimate, nondiscriminatory reason for terminating his employment to survive the motion for summary judgment.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court explained the now familiar burden-shifting analysis used in employment discrimination cases. Specifically, this Court addressed an employee's burden once an employer presents a legitimate, nondiscriminatory reason for an employment decision: the burden shifts to the employee to show pretext in that reason. The Court further explained that "[e]specially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the [improper conduct] were nevertheless retained or rehired." *McDonnell Douglas*, 411 U.S. at 804. Providing further clarification, this Court held in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 134 (2000), that a plaintiff's *prima facie* case of discrimination combined with sufficient evidence for a reasonable factfinder to reject the employer's legitimate,

nondiscriminatory explanation for its decision may be adequate to sustain a finding of liability for discrimination.

In this case, the Eleventh Circuit concluded Montague had satisfied the burden of production for a *prima facie* case of discrimination and that Asplundh had a presented a legitimate, nondiscriminatory reason for terminating plaintiff's employment. (Pet. App. 37). However, the Eleventh Circuit determined that Montague had not presented sufficient evidence to reject Asplundh's legitimate, nondiscriminatory reason for terminating his employment. In essence, the Eleventh Circuit found Montague's evidence of pretext lacking.[10] Thereafter, as an example, the Eleventh Circuit explained how Montague could have used a similarly situated comparator to show pretext. The Eleventh Circuit went on to note however that Asplundh treated the only similarly situated comparator the same as it treated Montague. Therefore, the Eleventh Circuit followed this Court's precedent and reached the proper conclusion that Montague did not produce evidence sufficient to show pretext.[11]

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[10] Montague cites *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) as support for his claim that inaccurate testimony about the termination decision allows a reasonable jury to infer the articulated reason is pretext. However, Montague has not shown inaccurate testimony about the discharge decision, and this Court in *Hicks* did not find that inaccurate testimony about an employment decision shows pretext, evidence of discrimination, or requires the denial of a Motion for Summary Judgment.

[11] In affirming the summary judgment in favor of Asplundh on Montague's retaliation claim, the Eleventh Circuit again found that Montague could not show pretext in Asplundh's legitimate, nonretaliatory reason for terminating his employment.

Montague's disagreement with the finding by the Eleventh Circuit that he could not prove pretext in Asplundh's decision to terminate his employment does not create an issue for review by this Court. Therefore, Montague's Petition is due to be denied.

IV. *Desert Palace* Does Not Eviscerate *McDonnell Douglas*

Faced with the garden variety employment discrimination case, the application of the *McDonnell Douglas* framework, and the improbability of review, Montague attempts to characterize this as a mixed-motive case and create an issue for review based on this Court's decision in *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003). While Asplundh included the mixed motive defense as a possible alternative defense in its Answer, Asplundh, in pleading this defense, specifically denied that race or Montague's complaints of alleged discrimination were factors in the decision to terminate his employment. Further, Asplundh's summary judgment motion and brief made no reference to the mixed motive defense and in fact, denied there was any evidence of discrimination or retaliation. Asplundh's preservation of a possible mixed motive defense in its Answer does not transform a single motive case into a mixed motive case. In fact, Montague did not assert any such argument at the district court level or in his initial appeal brief before the Eleventh Circuit. Again, it is only in the face of improbable review by this Court that Montague attempts to transform this straightforward single motive disparate treatment case into a mixed motive case. Notably, Montague failed to present a mixed motive case because he failed to establish, even viewing the facts in the light most favorable to him, that his race or complaints

of alleged discrimination were motivating factors in the decision to terminate his employment.

Not only does Montague attempt to transform this single motive case into a mixed motive case, Montague misapplies the holding in *Desert Palace*. In *Desert Palace*, this Court answered the question of whether a plaintiff must present direct evidence of discrimination to obtain a mixed motive jury instruction in a Title VII case. *Desert Palace*, 123 S. Ct. at 2150. In Montague's Writ, he assumes that *Desert Palace* applies in the instant case and that the *Desert Palace* decision erased over 30 years of case law involving employment discrimination by negating the use of the burden-shifting announced in *McDonnell Douglas*. To abandon *McDonnell Douglas* would cause great upheaval in employment discrimination cases. Clearly, if this Court had intended to revolutionize employment discrimination law by overruling over 30 years and countless cases explaining and analyzing such claims pursuant to the *McDonnell Douglas* burden-shifting standard, this Court would have, at the very least, mentioned or cited *McDonnell Douglas* in the *Desert Palace* opinion. The *McDonnell Douglas* case, however, was not mentioned in the *Desert Palace* opinion, demonstrating that the two are inapposite.

More importantly, in a post-*Desert Palace* decision, this Court reaffirmed the use of the *McDonnell Douglas* burden-shifting standard in a disparate treatment case brought under the Americans with Disabilities Act. In *Raytheon*, this Court explained:

> The Court in *McDonnell Douglas* set forth a burden-shifting scheme for discriminatory-treatment cases. Under *McDonnell Douglas*, a plaintiff must first establish a *prima facie* case of discrimination.

> The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment action. 411 U.S., at 802, 93 S.Ct. 1817. If the employer meets this burden, the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate treatment by, for instance, offering evidence demonstrating that the employer's explanation is pretextual. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). **The Courts of Appeals have consistently utilized this burden-shifting approach when reviewing motions for summary judgment in disparate-treatment cases.**

Raytheon Company v. Hernandez, 124 S. Ct. 513, 517 n.3 (2003) (emphasis added). As explained by this Court in *Raytheon*, the *McDonnell Douglas* burden-shifting analysis has been consistently applied in disparate treatment cases, like the one in the instant case. The Eleventh Circuit followed this consistent utilization when analyzing Montague's case under *McDonnell Douglas*. *Desert Palace* did not eviscerate *McDonnell Douglas* and Montague's attempts to transform this case into anything other than the garden-variety employment discrimination case fail. As such, the Petition presents no basis for review and should be denied.

CONCLUSION

Based on the foregoing, Montague's case presents no issue that merits this Court's attention or review, and the Petition should be denied.

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